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SUPREME COURT, U.S.

No. 81-5169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ELIGAAH ARDALLE JACOBS,

PETITIONER

VS.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Under Rule 3.191.(d)(2)(iv) of the Florida Rules of Criminal Procedure, the courts may exclude "a period of reasonable delay" resulting from an interlocutory appeal from the period of time within which every person charged with a crime must be brought to trial. In this capital case the Supreme Court of Florida construed and applied the Rule without regard to (i) the length of the delay (fifteen months) caused principally by the state's taking of an interlocutory appeal, (ii) the peripheral subject matter of the interlocutory appeal, (iii) the numerous objections of the petitioner to the delay resulting from the interlocutory appeal process, or (iv) the substantial prejudice to the continuously incarcerated petitioner who was on trial for his life. The decision below thus raises the question whether the Supreme Court of Florida by applying its "speedy trial" rule so as to exclude delays caused by the state's interlocutory appeal without regard to any of the four factors of the "balancing test" announced in Barker v. Wingo, 407 U.S. 514 (1972), has denied petitioner his fundamental due process right to a speedy trial guaranteed by the Fourteenth Amendment.

The decision below is in direct conflict with the controlling authority of Barker v. Wingo, supra, as well as every subsequent federal court decision that has considered the question, and petitioner therefore urges per curiam reversal.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Jacobs v. State, 396 So.2d 1113 (Fla. 1981), is set out in Appendix B, infra. The opinion of the District Court of Appeal of Florida upon the petitioner's motion to suppress, State v. Jacobs, 320 So.2d 45 (Dist. Ct. App. 1975), is set out in Appendix C, infra.

JURISDICTION

The judgment of the Supreme Court of Florida was announced on February 26, 1981 and entered, with rehearing denied, on May 4, 1981. An order extending to August 3, 1981 the time for filing a petition for writ of certiorari was signed by Justice Powell on June 23, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of a right secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the right to a speedy trial imposed on the states by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following provisions of the Rules of Criminal Procedure of Florida:

> Rule 3.191. Speedy Trial
>
> (a)(1). SPEEDY TRIAL WITHOUT DEMAND. Except as otherwise provided by this Rule, every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, capital or non-capital, and if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall ascertain that such person has been continuously available for trial during such period of time for trial. The time periods established by this section shall commence when such person is taken into custody as a result of the conduct or criminal episode giving rise to the crime charged. A person charged with a crime is entitled to the benefits of this Rule whether or not such person has been held to answer at a preliminary hearing, or whether or not such person has waived hearing, and whether such person is in custody awaiting trial or is at liberty on bail or recognizance. If such person is serving a sentence of imprisonment elsewhere than Florida for conviction of an unrelated crime, the operation of this section shall not be effective until such person is no longer confined. This section shall cease to apply whenever a person files a demand for speedy trial under §(a)(2).
>
> (a)(2). SPEEDY TRIAL UPON DEMAND. Except as otherwise provided, and subject to the limitations imposed under section (c) hereof, every person charged with a crime by indictment or information shall upon demand filed with the court having jurisdiction and upon service of a copy of such demand upon the prosecuting attorney be brought to trial within 60 days, unless the State is granted a continuance because of exceptional circumstances as defined in this Rule, and if not brought to trial within such period of time following such demand shall upon motion timely filed with the court and served on the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall ascertain that such person has been continuously available for trial during said period of time. The time period established by this section shall commence when such demand has been properly filed and served. If such person is serving in Florida or elsewhere a

sentence of imprisonment for an unrelated crime, the operation of this section shall not be effective until such person is no longer imprisoned and becomes available for trial, nor until such person has abandoned or waived further proceedings under §(b)(2) of this Rule if such have been initiated.

(a)(3). COMMENCEMENT OF TRIAL. A person shall be deemed to have been brought to trial if the trial commences within the time herein provided. The trial is deemed to have commenced when the trial jury panel is sworn for voir dire examination, or, upon waiver of a jury trial, when the trial proceedings begin before the judge...

(c) DEMAND FOR SPEEDY TRIAL: ACCUSED IS BOUND. A demand for speedy trial binds the accused and the State. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain trial sooner than otherwise might be provided. A demand for speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case, and that he is prepared or will be prepared for trial. Such demand may not thereafter be waived or withdrawn by the accused, except on order of the court, with consent of the State or on good cause shown. Good cause for continuances or delay on behalf of the accused shall not thereafter include lack of preparation, failure to obtain evidence or presence of witnesses, failure to have counsel, or other nonreadiness for trial, except as to matters which may arise after the demand for trial is filed and which could not reasonably have been anticipated by the accused or his counsel. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this Rule.

(d)(1) MOTION FOR DISCHARGE: TRIAL: WHEN TIMELY. A motion for discharge shall be timely if filed and served on or after the expiration of the periods of time for trial provided for herein; however, a motion for discharge filed before expiration of the period of time for trial shall be deemed effective only as of the date of expiration of the period of time for trial.

(d)(2). WHEN TIME MAY BE EXTENDED. The periods of time established by this Rule for trial may at any time be waived or extended by order of the court (i) upon stipulation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing, or (ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined, or (iii) with good cause shown by the accused upon waiver by him or on his behalf, or (iv) a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental compe-

tency or physical ability of the defendant to stand trial, for hearings on pre-trial motions, for interlocutory appeals, and for trial or other pending criminal charges against the accused. For the purposes of this Rule, any other delay shall be unexcused.

(d)(3). CONTINUANCES: EFFECT ON MOTION. If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that (i) a time extension has been ordered as provided in §(d)(2), or (ii) the failure to hold trial is due to the unexcused actions or unexcused decisions of the accused, or of a co-defendant in the same trial. If a continuance or delay is attributable to the accused and is not excused, the pending motion for discharge shall on motion by the State be voidable by the court in the interests of justice; provided, however, trial shall be scheduled and commence within 90 days...

(e) AVAILABILITY FOR TRIAL. The trial of an accused who is not available shall be held in abeyance while such person is unavailable. A person who has not been continuously available for trial during the term provided for herein is not entitled to be discharged; no presumption of non-availability attaches, but if the State objects to discharge and presents any evidence tending to show non-availability, the accused then must by competent proof establish continuous availability during the term.

If an accused voluntarily removes himself from the jurisdiction of the court or otherwise acts to make himself unavailable for trial, the right to trial within the time herein provided shall on motion by the State be voidable by the court in the interests of justice. Upon such accused becoming available for trial and upon notice thereof by the accused or his counsel to both the court having jurisdiction over the trial and to the office of the prosecutor, or upon being retaken into custody, the time within which trial is to commence shall be as herein provided and begin anew.

(f) EXCEPTIONAL CIRCUMSTANCES. As permitted by this Rule, the court may order an extension of time or continuance where exceptional circumstances are shown to exist; exceptional circumstances shall not include general congestion of the court docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or forseeable delays.

Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court. Such circumstances include (i) unexpected illness or unexpected incapacity or unforseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and

> adequate trial; (ii) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule; (iii) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; provided, not more than two continuances shall be granted on this ground; (iv) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (v) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the case in order to proceed promptly with trial of the defendant; (vi) a showing by the state that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.
>
> Under the foregoing circumstances the Court may set a new trial date within a reasonable time...

STATEMENT OF THE CASE

Petitioner, a citizen of Florida, was arrested in Florida on November 17, 1974 and was incarcerated continuously from that date to the trial date, February 10, 1976, a total of almost 15 months. (R. Vol. I, p.3; Vol. IV, p. 699). A Grand Jury in Pasco County, Florida, indicted him on December 12, 1974 for two counts of first degree murder. (R. Vol. 1, pp. 1-2). On the date set for the original trial, March 18, 1975, the State sought the first of what was to be a series of five continuances of petitioner's capital trial. (R. Vol. IV, pp. 678-79). Petitioner objected to each and every continuance and on August 5, 1975 filed a motion to discharge the proceedings for failure to provide him with a speedy trial. (R. Vol. V, pp. 884-86). The motion was denied. (R. Vol. V, p. 938).

The State offered as the reason for the initial extension their intent to file an interlocutory appeal from an order suppressing evidence seized at petitioner's arrest. (R. Vol. IV, pp. 678-79). The reasons given for the remaining four continuances also related to the preparation and prosecution of the interlocutory appeal. (R. Vol. V, pp. 765, 768, 794, 888-90). After an unexplained two week delay by the state, the interlocutory appeal

was commenced on April 4, 1975. (R. Vol. V, p. 760-61). It was not until December 5, 1975 that the trial court finally entered an order affirming the petitioner's motion to suppress the evidence. (R. Vol. V, pp. 911-12). A chronology setting out the events of the case is attached to this petition in Appendix A, infra.

Trial commenced February 10, 1976 resulting in the conviction of the petitioner. (R. Vol. V, pp. 931-935). He received a death sentence on each of the two counts. (R. Vol. VI, pp. 944, 947). During the entire delay of fifteen months resulting from the state's resort to the interlocutory appeal process, petitioner, while incarcerated, maintained he was available for trial. (R. Vol. V, pp. 769, 891-892, 917). Petitioner, during his incarceration at the county jail, was so despondent he tried to commit suicide. (App. D, p. 28a). Petitioner appealed his conviction to the Supreme Court of Florida relying in part on his speedy trial claim. (R. Vol. VI, pp. 976-79). The Supreme Court of Florida rejected his claim and denied a motion for a rehearing. (App. B, pp. 5a - 16a).

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

This Court, in referring to the controlling principle as to the question of sufficient presentation, has stated:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Street v. New York, 394 U.S. 576, 584, (1969) quoting New York ex rel. Bryant v. Zimmerman 278 U.S. 63 (1928).

Florida Rule of Criminal Procedure 3.191., supra, embodies and protects the fundamental right of a speedy trial under the Due Process Clause of the Fourteenth Amendment of the United

States Constitution.[1] Petitioner's repeated claim of denial of a speedy trial under the Florida Speedy Trial Rule advanced his fundamental due process right and is reflected by the overall tenor of the record. (R. Vol. V, pp. 884-86, 891-92, 936-37; Vol. VI, p. 978-79; Brief for Appellant at 19, Jacobs v. Smith, 396 So.2d 1113 (Fla. 1981); Reply Brief of Appellant at 9). The Supreme Court of Florida implicitly recognized petitioner's assertion of this fundamental right when, rejecting his claim, the Supreme Court of Florida stated,

> As we stated in State v. Jenkins, 389 So.2d 971, 974 (Fla. 1980), "(I)f the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . ." (App. B, p. 8a).

Relief was denied petitioner without further explanation and without any consideration of the delay caused by the interlocutory appeal, the validity of the asserted need for the appeal, petitioner's objections to the delay, or possible prejudice to petitioner caused by the delay.

REASONS FOR GRANTING THE WRIT

This petition focuses on the single but critical fact that in this capital case involving the constitutional issue of a speedy trial the Supreme Court of Florida failed to consider or apply the balancing test announced in Barker v. Wingo:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

407 U.S. 514 at 530.

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[1] This court, in Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967), held that the speedy trial guarantee applied to the states through the due process clause of the Fourteenth Amendment.

The omission by the Supreme Court of Florida is unexplicable: the court specifically noted petitioner's claim to a speedy trial, described in detail the delay caused by the state's interlocutory appeal, stated that the delay must be measured against a "constitutional test", and peremptorily dismissed the issue with the true but inconclusive observation that "the mere lapse of time before trial is not the only factor to be considered under such circumstances." (App. B, pp. 7a-9a). Barker v. Wingo, supra, was neither cited nor discussed.

The fact that the delay was caused principally by the State's interlocutory appeal does not excuse or justify the omission. Lower federal courts have uniformly held that the Barker balancing test must be applied in every case of prejudicial delay caused by the state's pursuit of an interlocutory appeal. See, e.g., United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978); United States v. Herman 576 F.2d 1139, 1144-47 (5th Cir. 1978); United States v. Brown, 520 F.2d 1106, 1110-13 (D.C. Cir. 1975); United States v. Jackson, 508 F.2d 1001, 1003-05 (7th Cir. 1975); United States v. Calloway, 505 F.2d 311, 315-19 (D.C. Cir. 1974); United States v. Perry, 353 F.Supp. 1235, 1237-41 (D. D.C. 1973).

Admittedly Barker v. Wingo requires the application of the balancing test only when the delay is long enough to be "presumptively prejudicial." 407 U.S. 514 at 530. But surely in a state with a one-hundred and eighty (180) day benchmark,[2] a delay of fifteen (15) months is long enough to create the presumption of prejudice.

Indeed a majority of the federal courts consider a delay of more than one year to be prima facie unreasonable. See, e.g. United States v. Netterville, 553 F.2d 903, 913-14 (5th Cir. 1977); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir. 1974). Delays as short as six months or thereabouts have been

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[2]See Fla. R. Crim. P. 3.191(a), supra.

sufficient to trigger an analysis of the Barker balancing test.[3] See, e.g., United States v. Barney, 550 F.2d 1251, 1252-53 (10th Cir. 1977); United States v. Carpenter, 542 F.2d 1132, 1134 (9th Cir. 1976); United States v. Butler, 462 F.2d 1275, 1277 (1st Cir. 1970).

For the purpose of applying the Barker test, the right to a speedy trial attaches at the time of the arrest. Dillingham v. United States, 423 U.S. 64, 65 (1975). In this case petitioner was arrested on November 14, 1974 and the trial began February 10, 1976 - a delay of four hundred and fifty-two (452) days, almost fifteen months. Under the authorities cited, this trial delay would be considered "presumptively prejudicial", requiring application of the Barker test. The failure of the Supreme Court of Florida to use the Barker analysis must be regarded as a decision of a federal question in a way which directly conflicts with the applicable decision of this Court[4], mandating summary reversal of the decision below.

The threshold requirement of a prejudicial length of delay having been satisfied, the second factor to be considered in the analysis of a speedy trial claim is the reason for the delay, further revealing petitioner's entitlement to relief. A common source of substantial delay in the judicial process is the taking of an interlocutory appeal by the government prior to trial. See, e.g., United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978); United States v. Herman, 576 F.2d 1139, 1143 (5th Cir. 1978); United States v. Brown, 520 F.2d 1106, 1109 (D.C. Cir. 1975).

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[3]This Court has suggested that length of delay is related to the reason for delay by the nature of the charge saying, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge...." Barker v. Wingo, 407 U.S. 514 at 531. Petitioner in this case was charged with a serious but not a complex crime. Over a short three day trial, only thirteen people testified and seventeen exhibits were examined. (R. Vol. V, pp. 931-35). Considering the brevity of the trial, the delay of fifteen months is suspect.

[4]See Sup. Ct. R. 17.1(c)(1980).

The State of Florida in this action claimed below that the mere taking of an interlocutory appeal, without more, was a valid and sufficient reason to justify the delay. (R. Vol. IV, pp. 678-79; Vol. V, pp. 765, 768, 794, 888-90). Indeed, it appears to claim that a showing of justification is not necessary. However, in determining the legitimacy of governmental delay, this Court has stated that reasons necessitating the delay must be scrutinized and found to be legitimate. Dickey v. Florida, 398 U.S. 30, 52 (1970). The state of Florida has failed to proffer any such reasons for the delay. In this case the interlocutory appeal of the suppression order was peripheral and inconsequential to the conduct of petitioner's trial, and the prosecution's efforts to reverse the order were, moreover, appropriately rejected by the state court. At issue in the appeal was merely the suppression of a pair of black work boots and some ammunition but not the murder weapon itself. (R. Vol V, pp. 744-45). The state argued that the boots were necessary to match a heel print and that the ammunition connected petitioner to the murder weapon. (R. Vol IV, pp. 737-38). This circumstancial evidence, however, would have been merely cumulative of the testimony of witnesses which placed the petitioner at the location of the crime, and connected petitioner with the precise instrument of the crime. (R. Vol IX, pp. 1424-30, 1449-58, 1463-64, 1504-15, 1532-36). The Appellate Court remanded the suppression motion to the trial court for a findings of fact. (Appendix C, p. 18a-23a). On remand, the trial court found that the statements in the search warrant affidavit were sufficiently erroneous as to invalidate the search warrant. (R. Vol. 5, pp. 909-10). There was sufficient evidence to establish that at the time of the arrest, the law enforcement officers knew the supposed murder weapon, a .38 caliber automatic, was no longer in Florida and that the weapon seized, among other things, a .38 caliber charter arms blue steel two inch barrell pistol, was not the murder weapon. (R. Vol. IV, pp. 695-698; R. Vol. V, pp. 911-12).

Finally, the appeal took no less than nine (9) months[5], a factor which, assuming arguendo that the appeal was necessary, establishes that a considerable portion of the delay was avoidable. See United States v. Brown, 520 F.2d 1106, 1108 (D.C. Cir. 1975); United States v. Perry, 353 F.Supp. 1235, 1238 (D. D.C. 1973); cf. United States v. Osuna-Sanchez, 446 F.2d 566, 567 (9th Cir. 1971). Thus, an examination of the reasons for the delay - a process not undertaken by the Supreme Court of Florida - reveals a virtually frivolous appeal conducted over an unconscionably long period of time. Surely these are circumstances which require the exercise of the supervisory powers of this Court.

With regard to the third factor, the Barker Court held that "the defendant's assertion or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right". 407 U.S. 514 at 528. Petitioner in this case asserted his availability for trial throughout the entire fifteen month period of his incarceration. (R. Vol V, pp. 769, 884-86, 891-92, 917, 936-37; Vol VI, pp. 978-79). After objecting to the second, third and fourth continuances, petitioner requested dismissal for failure to provide him with a speedy trial. (R. Vol. V., pp. 884-86; App. E, p. 30a). Petitioner's counsel also objected to the fifth continuance. (R. Vol. V., pp. 891-92). As to petitioner's acquiescence to the original extension, (R. Vol. V, p. 917), this Court stated as a reason for rejecting the "demand rule" that a defendant should not be penalized for tolerating some delay because he finds it reasonable and helpful in preparing his own case. Barker v. Wingo, supra, 407 U.S. 514 at 527. Petitioner's subsequent objections are important because the State was put on

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[5]The State indicated its intent to file an interlocutory appeal at the suppression hearing on March 17, 1981. (R. Vol. IV, pp. 741-742). On December 5, 1975 the trial court in applying the findings of fact affirmed the suppression order. (R. Vol. V, pp. 911-12).

notice that it would be held strictly accountable for the passage of time. See United States v. Carini, 562 F.2d 144, 150 (2d Cir. 1977); cf. United States v. New Buffalo Amusement Corp., 600 F.2d 368, 378 (2d Cir. 1979). In sum, petitioner has continuously asserted his claim to a speedy trial and the third element of the Barker test is fully satisfied.

The final factor enunciated in Barker is prejudice to the petitioner. Petitioner was denied bond at the bond hearing on March 19, 1975. (R. Vol. IV, p. 681). Thus, he was incarcerated for four hundred and fifty-two (452) days, which included nine months during the entire interlocutory appeal process. This Court has held the speedy trial right to be an important safeguard "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120 (1966). In the case below, there can be little doubt that petitioner has been subjected to significant prejudice by virtue of this inexcusably long period of incarceration under the extraordinary stress of a capital prosecution.

This Court has described the serious disadvantages for an accused who cannot obtain his release:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Barker v. Wingo, supra, 407 U.S. 514 at 532.

Petitioner suffered deprivation of his liberty. (R. Vol. IV, p. 681). There is an abundance of evidence from which to conclude that his health deteriorated, and previous marital problems were exacerbated. (App. D, pp. 26a-27a; R. Vol. IX, pp. 1489-90, 1518-19, 1537, 1541-42, 1547). Anxiety and depression unquestionably had a debilitating effect upon him. Indeed,

petitioner tried to commit suicide by slashing his wrists while he was in the county jail. (App. D, p. 28a).

In Smith v. Hooey, 393 U.S. 374, 380 (1969), this Court recognized that a man isolated in prison is powerless to exert his own efforts to mitigate the erosive effects of the passage of time. Where, as in this case, the conviction of the petitioner is dependent upon circumstantial evidence, the impairment of his defense by the delay resulting from the interlocutory appeal is a factor to which this Court must give serious consideration. Not only is it virtually impossible to ascertain precisely the cost of delay in terms of the effect upon the memories of the parties, but as this Court has observed "what has been forgotten can rarely be shown." Barker v. Wingo, 407 U.S. 514, 532 (1972); see also, Dickey v. Florida, 398 U.S. 30, 53 (1970).

Finally, this Court has "expressly rejected the notion that an affirmative demonstration of prejudice was necessary" to establish the petitioner's constitutional right to a speedy trial. Moore v. Arizona, 414 U.S. 25, 26 (1973).

While society has an interest in an effectively administered criminal justice system, "delays in trials are often one of the gravest threats to individual rights." Burger, The State of the Judiciary - 1970, 56 A.B.A.J. 929, 932 (1970). The delay in this case which the state would justify solely on the ground that it chose to prosecute an interlocutory appeal, for whatever reason and for however long, is a dramatic instance of the threat described by Chief Justice Burger. The burden is upon the government to prove that the delay was justified and here that burden has not been carried. See United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979); United States v. Perry, 353 F.Supp. 1235, 1238 (D. D.C. 1973). The Supreme Court of Florida's disposition of this case is vulnerable by virtue of its failure to apply the controlling test as set forth in Barker.

The Supreme Court of Florida's analysis of petitioner's claim completely ignored the appropriate federal constitutional standards to be applied. Under the proper standards, petitioner is entitled on the face of the record to the relief requested.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

CHRONOLOGY

APPENDIX A

JACOBS V. STATE
CHRONOLOGY

DATE	EXPLANATION AND SOURCE	
11/17/74	Defendant arrested (Vol I, p.3)	(trial date was originally set for March 18, 1975; trial actually commenced February 10, 1976)
11/18/74	Advisory Hearing (Vol I, 4-5)	
12/12/74	Grand Jury Indictment (Vol I p. 1-2)	
12/30/74	Arraignment (Pasco County Cir. Crim. Ct. minutes) (Vol. I, p. 200)	
2/26/75	Defendant filed motion to suppress evidence (Vol. II, p. 243-44)	
3/17/75	Hearing on motion to suppress (Pasco County Cir. Crim. Ct. minutes) (Vol. IV, p. 677); court orally granted motion (transcript) (Vol. IV, p. 682-743)	
3/18/75	State filed motion for continuance of Speedy Trial Rule (Vol. IV, p. 678-679)	
	Defendant stated at hearing he was ready for trial, but had no objection to appeal if that was the intention of State (transcript) Vol. V, p. 917)	
3/18/75	Court granted extension of time for trial (Vol. IV, p. 680); Order does not specify time period; Transcript indicates no more than 60 days (Vol. V, p. 918)	
3/19/75	Court denied motion for bond (Pasco County Cir. Crim. Ct. minutes) (Vol. IV, p. 681)	
3/25/75	Court entered order granting suppression (Vol. V, pp. 744-45)	
4/4/75	Notice of Interlocutory Appeal (Vol. V, p. 760)	
4/11/75	State filed motion for extension of time (asked for 30 days) (Vol. V, p. 765)	

DATE	EXPLANATION AND SOURCE
4/11/75	Court granted extension of 30 days for filing of brief; 45 days total from Notice of Interlocutory Appeal (April 4) (Vol. V, p. 766)
4/16/75	Stated filed motion for extension (Vol. V, p. 768)
4/16/75	Defendant objected to motion for extension (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 769)
4/16/75	Court ordered extension for 30 days beginning May 16, 1975 (Vol. V, p. 770)
6/6/75	State filed motion to extend trial (reasonable time necessary for ruling on appeal) (Vol. V, p. 794)
6/11/75	Court ordered extension granting a reasonable period after filing of opinion (Vol. V, p. 795)
7/22/75	State secured trial date of August 26, 1975 (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 883)
8/5/75	Defendant filed motion to discharge (transcript) (Vol. V, p. 917); (Vol. V, p. 884-886)
8/19/75	State filed motion for continuance (Vol. V, p. 888-890)
8/20/75	Defendant filed affidavit opposing motion for continuance (Vol. V, p. 891-92)
8/21/75	Court ordered removal of trial date (Vol. V, p. 893)
8/25/75	Trial continued to be reset (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 894)
9/19/75	Opinion of Appellate Ct. on appeal of motion to suppress evidence (reversed and remanded for fact finding) (App. C. pp. 18a-23a)
9/26/75	Defendant filed motion to modify order of 8/20 extension (Vol. V, p. 896)
11/6/75	Mandate of Appellate Ct. on appeal of motion to suppress evidence to the trial court for findings of fact and remand (Vol. V, p. 902-07)

DATE	EXPLANATION AND SOURCE
12/2/75	Findings of fact on remand of motion to suppress (Vol. V, pp. 909-10)
12/5/75	Amended order granting motion to suppress (Vol. V, p. 911-912)
12/15/75	Trial date reset to February 10, 1976 (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 913)
2/10/76	Court denied motion to discharge (Vol. V, p. 938)
2/10/76	Defendant filed Motion to Quash (Vol. V, pp. 936-37)
2/10/76	Court denied motion to Quash (Vol. V, p. 939)
2/10/76 - 2/13/76	(Trial Cir. Crim. Ct. Minutes of trial) (Vol. V, pp 931-935); (transcript of trial) (Vol. VII-X)

APPENDIX B

OPINION OF THE SUPREME COURT OF FLORIDA

APPENDIX B

Elgrah Ardalle JACOBS, Appellant,

v.

STATE of Florida, Appellee.

No. 49345.

Supreme Court of Florida.

Feb. 26, 1981.

Rehearing Denied May 4, 1981.

Defendant was convicted before the Circuit Court, Pasco County, Ray E. Ulmer, Jr., J., of first-degree murder, was sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) refusal to give instruction that intoxication may negate specific intent required to establish commission of first-degree murder was not error; (2) defendant was not denied a speedy trial; (3) purge of grand juror from voter list prior to indictment did not render the indictment unlawful; (4) it was not constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, while defendant exercised his right to jury trial and ultimately received a death sentence; (5) refusal to allow defendant to inform jury in closing argument of sentences imposed on accomplices was not error; and (6) consideration of the factual situation as constituting four aggravating circumstances instead of three, in trial judge's finding in support of death sentence, was error but was not prejudicial.

Affirmed.

Sundberg, C.J., and England, J., concurred in affirmance of convictions of guilt, but dissented, with reasons, from affirmance of the death sentences.

Lester Bales, Jr., Zephyrhills, for appellant.

Jim Smith, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from judgments adjudging defendant guilty of murder in the first degree and sentences of death, resulting from a two count indictment. Our jurisdiction vests under Article V, section 3(b)(1), Florida Constitution (1972).

On the evening of March 4, 1974, at approximately 11:00 p. m., the appellant (Jacobs) and three companions, his wife, Thomas Collins, and Elisha Chavis, went to Ed's Country Store in Pasco County intending to rob the store. En route the entire group consumed an undetermined amount of intoxicating beverages.

Upon arriving at the store, Jacobs and Chavis went inside while Jacobs' wife went to the restroom. Collins remained outside near the car. While the robbery was in progress, the caretaker of the store, Grant Ison, reached into his pocket and Jacobs shot and killed him for fear that Ison had a gun. Seconds afterward, Chavis shot and killed the sole other occupant of the store, Barry Marsh, when Marsh approached Jacobs with a large knife. Jacobs and Chavis then left the store taking with them an unspecified amount of beer, cigarettes, and money, which was later divided among the group.

Approximately eight months after the robbery, Jacobs' wife went to Massachusetts where she gave a statement to Lieutenant Richard Coughlin of the Massachusetts State Police setting forth the details of the offense. This information was transmitted to the Pasco County Sheriff's Department and resulted in the arrest of Jacobs, Chavis, and Collins. An indictment was returned charging Jacobs with the two murders. Jacobs was tried and convicted of first degree murder on both counts. He was sentenced to death on each count.

On this appeal Jacobs raises five points as error.

First, Jacobs argues that it was reversible error for the trial judge to refuse to instruct the jury that intoxication may negate the specific intent required to establish the commission of the crime. In the usual

case, to be guilty of first degree murder the defendant must not only intend to kill another human being, but in addition the state must prove that the homicide was perpetrated from a premeditated design. In such case intoxication may make the killer incapable of the reflection called for by the requirement of premeditation. But this case is not the usual case of premeditated murder; this case involves application of the felony murder doctrine.

[1, 2] In cases of felony murder the mental element of the offense is that which is required for the felony; premeditation is supplied by the felony. *Adams v. State*, 341 So.2d 765 (Fla.1976). Thus a defendant charged with first degree felony murder on account of a killing during the commission of a robbery may defend himself on the ground that he was too intoxicated to entertain the intent to rob.

[3] Jury instructions regarding intoxication, however, need not be given in every case in which evidence has been adduced at trial that the defendant consumed alcoholic beverages prior to the commission of the offense. *Shaw v. State*, 228 So.2d 619 (Fla. 2d DCA 1969). There was evidence that Jacobs had used intoxicating beverages, but there was no evidence that Jacobs was intoxicated. There is no evidence as to the amount of alcohol consumed during the several hours Jacobs drove around prior to the robbery.

[4] In this case the record reveals that the trial judge did not commit reversible error in denying the requested jury instructions. The accomplices' testimony shows that the robbery was carried out from a preconceived plan and, until the shooting erupted, it was successful. Also, the evidence clearly shows that defendant was capable of reflection at the time of the homicides and premeditation was thus proved. This being so, the felony murder evidence was merely cumulative to show premeditation.

Jacobs' second point on appeal is that the 180-day speedy trial rule was violated. Jacobs was taken into custody on November

17, 1974. On February 26, 1975, he filed a motion to suppress certain evidence, which was granted on March 17, 1975. On March 18, 1975, the state sought, and the trial court granted, a continuance to take an interlocutory appeal of the suppression order. Fla.R.Crim.P. 3.191. Successive motions for extensions of time were granted to the state by the trial judge, including a June 11, 1975, extension for a reasonable period of time after the appellate court filed its opinion in the interlocutory appeal. The mandate of the appellate court (reversing and remanding the trial court's order granting the motion to suppress) was received by the trial court on November 6, 1975. Jacobs was brought to trial on February 10, 1976.

Jacobs argues that the trial court's initial extension of time was for 60 days and that, because the subsequent extensions were outside the trial court's jurisdiction during the appeal, the speedy trial rule was violated.

[5] Jacobs is in error. A review of the record reveals that the initial extension of time was not limited to a time certain. The extension was for a reasonable time in which the state could expeditiously pursue the interlocutory appeal. The additional extensions of time were effective because only the trial court, not the appellate court, may grant an extension of the speedy trial time period while an interlocutory appeal is pending. *State v. Barnett*, 366 So.2d 411 (Fla.1978).

[6-8] The June 11, 1975, order of the trial court validly extended the time until a reasonable period after the appellate court filed its opinion. As we stated in *State v. Jenkins*, 389 So.2d 971, 974 (Fla.1980), "[I]f the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . . ." In the absence of these time limitations, the question of whether a trial date affords defendant a speedy trial must be determined in the light

of the circumstances of the particular case as a matter of judicial discretion. The mere lapse of time before trial is not the only factor to be considered under such circumstances. This was the reasoning in *State ex rel. Butler v. Cullen*, 253 So.2d 861 (Fla. 1971), where defendant sought a continuance. This rule is equally applicable when the state seeks a continuance. *See King v. State*, 303 So.2d 389 (Fla. 3d DCA 1974).

[9] Jacobs' third point on appeal is that one of the members of the grand jury which indicted him was not a qualified elector on the date the indictment was returned, and the indictment is therefore unlawful. The appellant made a timely motion to dismiss the indictment, which was denied, thereby preserving this point for appeal.

Section 40.01, Florida Statutes (1973), provides *inter alia* that grand jurors "*shall be taken* from the male and female persons over age of twenty-one years, . . . who are fully qualified electors of the respective counties." (Emphasis supplied). The challenged grand juror, although a qualified elector at the time her name was placed on the jury list, was purged from the voter list prior to Jacobs' indictment. Jacobs argues that the participation of this grand juror voids his indictment, citing the case of *Kitrol v. State*, 9 Fla. 9 (1860), where a grand juror who was determined not to be qualified because over the age of sixty at the time he was summoned for jury duty, rendered the indictment void.

The applicable statute, section 40.01, Florida Statutes (1973), merely requires that the names placed on the jury list "shall be taken" from the voting list. *Johnson v. State*, 296 So.2d 71 (Fla.1974). The statute does not mandate that the grand juror be on the voting list when an indictment is returned. Appellant's third point is therefore without merit. *See also Reed v. State*, 292 So.2d 7 (Fla.1974); *Jones v. State*, 289 So.2d 385 (Fla.1974).

[10] Jacobs' fourth point on appeal is that the imposition of the death penalty in this case would be a denial of equal protection. The Florida statute inflicting capital

punishment has been held constitutional. *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd*, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Jacobs says, however, that the death penalty is unconstitutionally imposed when a co-defendant on similar facts is not sentenced to death. He cites *Slater v. State*, 316 So.2d 539 (Fla.1975), where we held that the imposition of the death penalty against a defendant convicted a first degree felony murder was unconstitutionally applied where the defendant had been an accomplice and the "trigger man", who had entered a plea of guilty, was sentenced to life imprisonment.

We are not confronted with the situation in which the "trigger man" was sentenced to life and the accomplice improperly sentenced to death, *Slater v. State*, *supra*, nor are we confronted with the situation where the accomplice is sentenced to life and the "trigger man" properly sentenced to death, *Meeks v. State*, 339 So.2d 186 (Fla.1976). Instead, we are confronted with the situation in which there are two "trigger men", one (Chavis), who pleads guilty to second degree murder and is sentenced to life imprisonment, and another (Jacobs), who is convicted of first degree murder in a jury trial and is sentenced to death.

Essentially, appellant's argument is that in case of felony murder involving two "trigger men" it is constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, and allow the second "trigger man" to exercise his right to a jury trial and take his chances that a conviction and death sentence will result. We do not accept appellant's argument. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889, n. 50 (1976).

In a related point, Jacobs argues that the trial judge committed reversible error in denying the defendant the right to inform the jury of the sentences imposed on Jacobs' accomplices. He cites *Messer v. State*, 330 So.2d 137 (Fla.1976), where we remanded to the trial court for the purpose of conducting another sentencing hearing be-

cause the trial judge had erroneously refused to permit the defendant to inform the jury *at the sentencing phase* of the sentences imposed on the defendant's accomplices and of certain psychiatric testimony concerning the defendant.

[11-13] The case *sub judice* is quite different. Jacobs was precluded from informing the jury of the sentences imposed on his accomplices *at closing argument*; he made no attempt to present this evidence at the sentencing hearing. *Messer* stands for the proposition that evidence of the sentences imposed on the defendant's accomplices should not be withheld from the jury at the sentencing phase. § 912.141, Fla.Stat. (1975). Clearly, the jury should be allowed to weigh all the facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion. *Raulerson v. State*, 358 So.2d 826 (Fla.1978). But this does not mean that evidence which is admissible at the sentencing hearing is also admissible at trial. Nor does this mean that the state or the trial judge must provide the jury with such information if the defendant fails to do so; generally, it is improper for the state to disclose that another defendant has been convicted. *Thomas v. State*, 202 So.2d 883 (Fla. 3d DCA 1967). While it is clear that the legislature in the enactment of section 921.141, Florida Statutes (1975), sought to extend the admissibility of evidence at the sentencing hearing, it did not grant the defendant or the state any greater latitude at the trial phase of the bifurcated proceeding.

As for appellant's final point on appeal, we have reviewed the record and determined that it is without merit.

[14] It is our responsibility to review the judgment and sentence imposed upon defendant in light of other decisions and determine whether the punishment is too great. The following findings in aggravation and mitigation were made by the trial court:

FINDING IN SUPPORT OF DEATH SENTENCE

"On February 13, 1976, a majority of the jury recommended in favor of the death penalty for the Defendant; this Court, after considering the recommendation of the jury, and after weighing the aggravating and mitigating circumstances, as contained in Florida Statute 921.-141, sentenced the Defendant to death on each of the two counts as contained in the indictment filed in the above-styled cause and in so doing found as follows:

1. The Defendant committed or aided in the committing of these acts of murder while engaged in the commission of the crime of robbery upon the victims of the murder. The testimony of the three State witnesses, Paula Jacobs, Thomas Collins, and Jean Gray, indicated that the purpose of the Defendant being at the store was to commit a robbery, and that these murders were committed in furtherance of that motive.

2. This capital felony was committed in part for the purpose of avoiding or preventing the arrest or detection of the Defendant for the perpetration of the robbery. The State witness, Jean Gray, testified that the Defendant had made the statement to her that he never left any witnesses and that those that he did leave never "talked." The evidence further disclosed that the participants in the robbery indicated prior to entering the subject store that the witnesses (i. e. ultimate victims) could not be left alive to identify the Defendant Jacobs or others.

3. These acts of murder were committed by the Defendant for pecuniary gain. The testimony of Paula Jacobs and Thomas Collins shows that from the very outset of the sequence of events which led to the deaths of Grant Ison and Barry Marsh, the Defendant and others were together for the sole purpose of committing a larceny.

4. This capital felony was especially heinous, atrocious, and cruel in that the testimony of Paula Jacobs, during the guilt phase of the trial, revealed that the

Defendant started to her immediately following the shooting that after he shot the man behind the cash register, his victim begged the Defendant not to shoot again. Paula Jacobs further testified that the Defendant told her that he had started shooting and was not going to stop. Further, the testimony of the medical examiner shows that the man whose body was found behind the cash register had not died instantly, but was, in fact, alive for as much as an hour after he had been shot three times. Testimony of the medical examiner further indicated that the second victim had been shot a total of six times.

The only mitigating circumstances which this Court finds to exist is that the Defendant has no significant history of prior criminal activity. This Court feels that there are no other existing mitigating circumstances; and that, additionally, the evidence as presented during the guilt phase of the trial specifically negates all but the aforementioned mitigating circumstances found in Florida Statute 921.141(6).

WHEREFORE, this Court, upon weighing the aforementioned aggravating and mitigating circumstances, does, therefore, accept the advisory opinion rendered in this cause by the jury of twelve persons and hereby finds that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Finding 1 lists the aggravating circumstance of murder while engaged in the crime of robbery while Finding 3 includes the aggravated circumstance of murder for pecuniary gain. These are overlapping and constitute only one aggravating circumstance. *Provence v. State*, 337 So.2d 783 (Fla.1976), was an appeal from a judgment of first degree murder and sentence to death. At the sentencing hearing the jury rendered an advisory verdict recommending life. The trial judge considered as factors in aggravation that there were two armed robbery charges pending against defendant

in another state and that, according to the presentence investigation, defendant was at the time of his arrest engaged in ripping off a heroin addict. We held that the court erred in considering mere arrest and accusation as factors in aggravation. In this opinion we said:

> The judge's order does not specifically enumerate which aggravating circumstances under Section 921.141(5), Florida Statutes, induced him to override the jury's recommendation of mercy and to sentence Provence to die. The State argues the existence of two aggravating circumstances that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. *Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.* Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case. . . .

337 So.2d at 786. (Emphasis supplied).

In the case *sub judice* Finding 1, relating to the robbery, and Finding 3, relating to murder for pecuniary gain, constitute but one aggravating circumstance. In *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), we said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.

Statutes, Section 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

[15] It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances. The trial judge reasoned that a murder committed for pecuniary gain during the course of a robbery coupled with the heinous manner in which death was inflicted, as well as the circumstance that death was inflicted for the purpose of avoiding detection, required the imposition of a death sentence. The fact that these factual situations were considered as four aggravating circumstances instead of three does not indicate that the technical error committed by the judge in any way affected his reasoned judgment.

The case *sub judice* involves the listing of one aggravating circumstance in such a manner that the factual situation became two aggravating circumstances. *Elledge v. State*, 346 So.2d 998 (Fla.1977), involved an entirely different situation. Defendant Elledge was convicted and sentenced to death for the murder of Strack. The homicide occurred on a Saturday afternoon. On Sunday afternoon defendant Elledge murdered Gaffney. On Monday morning defendant murdered Nelson. The court held that admission of evidence of the Gaffney murder at the sentence hearing was improper because there had been no conviction of the defendant for this homicide. Evidence of the Nelson murder was appropriate because defendant had been convicted of this homicide. This Court reasoned that consideration of the Gaffney homicide could have influenced the judge in his reasoned judgment and therefore, defendant should be granted a new sentencing trial. In the case *sub judice* the trial court's reasoned judgment in imposing the death sentence could not have been influenced by an inappropriate factual situation. *Elledge, supra*, is not controlling.

We have carefully reviewed the record in this case and it is our opinion that the aggravating and mitigating circumstances are such that the infliction of capital punishment is warranted.

Finding no error, it is our opinion that the judgments and sentences should be and they are hereby affirmed.

It is so ordered.

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., and ENGLAND, J., concur in affirmance of the convictions of guilt, but dissent from affirmance of the death sentences. Because of violation of the principles announced in *Provence v. State*, 337 So.2d 783 (Fla.1976) and *Elledge v. State*, 346 So.2d 998 (Fla.1977), they would remand to the trial judge for resentencing.

APPENDIX C

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX C

STATE of Florida, Appellant,

v.

Elijaah Ardalle JACOBS, Appellee.

No. 75-503.

District Court of Appeal of Florida, Second District.

Sept. 19, 1975.

Rehearing Denied Nov. 5, 1975.

At hearing on defendant's motion to suppress evidence, the Circuit Court for Pasco County, Robert L. Williams, J., ruled that affidavit for search warrant was insufficient on its face to establish probable cause, and State brought interlocutory appeal. The District Court of Appeal, Scheb, J., held that affidavit for search warrant detailed sufficient underlying facts and circumstances on which to base belief that probable cause existed, and was sufficient on its face, and that at evidentiary hearing held to determine truthfulness of affidavit for search warrant, it was incumbent on trial judge to determine whether affiant made any material misstatements in warrant affidavit.

Reversed and remanded.

Robert L. Shevin, Atty. Gen., Tallahassee, and Davis G. Anderson, Jr., Asst. Atty. Gen., Tampa, for appellant.

Lester Bales, Jr., Zephyrhills, for appellee.

SCHEB, Judge.

The trial court held that an affidavit was insufficient on its face to establish probable cause for issuance of a warrant for search of a dwelling. The state appeals. We reverse and remand.

Deputy Sheriff Everett Keister executed an affidavit on November 18, 1974, in application for a warrant to search a mobile home in Polk County occupied as a private dwelling. A search warrant was issued by a magistrate commanding search of the dwelling therein described. After a hearing on the appellee/defendant's motion to suppress, the trial court ruled Deputy Keister's affidavit was insufficient on its face to establish probable cause. The court suppressed the items seized as a result of the execution of the warrant, including a pair of black work boots and 37 rounds of .380 caliber ammunition not described in the warrant.

[1] The only question now before us is whether Deputy Keister's affidavit [1] was

1. The material part of the affidavit, insofar as relates to the issue of probable cause, states as follows:

> On the night of March 5, 1974 at approximately 5:00 P.M. three white males and one white female, later identified as Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis and Pauline Jacobs, wife of Elijah Jacobs. The four people were seen in a late model Chrysler cream colored

sufficient on its face to allege probable cause. The affidavit alleges a confession of one Pauline Jacobs to a Lt. Coughlin on November 17, 1974. She stated she accompanied appellee/defendant and two other males at a robbery/murder in Pasco County on March 5, 1974, and that firearms used in that crime were, on November 16, 1974, in the dwelling sought to be searched. This admission, being against penal interest, provides its own indicia of reliability. *United States v. Harris*, 1971, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723. Also, Pauline Jacobs allegedly stated she was present when the appellee/defendant committed the breaking and entering which Deputy Keister was investigating where firearms had been stolen from Sumner's Services in Polk County on October 24,

station wagon parked on a dirt road behind Chancey's Country Store, Hiway 39 on the Hillsborough Pasco County Line. Shortly thereafter three white males entered Chancey's Country Store and robbed one of the two white males at gun point taking from him several hundred dollars and then the three white males or one or two of the three, shot and killed both of the two white males who were in the store and filling station and then left the scene.

Subsequently, to-wit, on or about November 17, 1974, the said Pauline Jacobs confessed to Detective Lieutenant Richard Coughlin of the Massachusetts State Police in Bourne, Massachusetts, that it was she and the said Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis who had gone in the said cream colored late model Chrysler station wagon to the said Chancey's Country Store and Filling Station and that it was her three male companions aforesaid who robbed and murdered the two white males aforesaid. She further stated to the said Detective Lieutenant Richard Coughlin that she had been in the above-described house trailer or mobile home on Saturday, November 16, 1974 and at that time there was contained in said mobile home or house trailer the firearms which had been used by her male companions in the robbery and murder aforesaid and that when she left said premises said firearms were still there.

Between 5:00 P.M. on October 24, 1974 and 7:00 A.M. on October 24, 1974 the place of business known as Sumner's Service and Motor Parts in the settlement of Willow Oak near Mulberry, Florida was broken in-

1974. Finally, affiant stated he talked with one Thomas Collins, an alleged co-felon in the crime for which appellee/defendant is being prosecuted. Collins, who allegedly admitted his presence at the scene of the Pasco County crime to another police officer, stated to affiant that he had recently been in the dwelling sought to be searched and that it did, indeed, contain 10 or 12 firearms.

[2, 3] The affidavit here details sufficient underlying facts and circumstances on which to base a belief that probable cause exists and is sufficient on its face. Affidavits for search warrants are normally drafted by nonlawyers under the press of criminal investigation and are tested and interpreted by courts in a common

to and the firearms thereinabove described as taken therefrom were taken therefrom. Subsequently, to-wit on or about November 17, 1974 the said Pauline Jacobs stated to the said Detective Lieutenant Richard Coughlin that between 5:00 P.M. on October 24, 1974 and 7:00 A.M. on October 25, 1974 she was in company with the said Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis, who did break and enter said Sumner's Service and Motor Parts as aforesaid and take therefrom firearms and money.

On the evening of November 17, 1974 Affiant arrested the said Thomas Collins and the said Elijah Chavis and incarcerated them in the Polk County Jail at Bartow, Florida and during the conversation between Affiant and the said Collins, the said Collins told Affiant that he had recently been in said house trailer or mobile home aforesaid belonging to the said Jacobs and had there seen some 10 or 12 firearms in said house trailer or mobile home.

On November 18, 1974, Affiant talked over the telephone to Deputy Sheriff Lt. Vogt of the Pasco County, Florida Sheriff's Office who informed Affiant that he had the said Collins in custody (Collins, Chavis and Jacobs having previously been turned over to the Pasco County Sheriff's Office by Affiant) and that the said Collins had informed him that said Lt. Vogt that he, the said Collins, had been present with the said Jacobs and the said Chavis at the armed robbery and double murder aforesaid, but the said Collins denied taking part in said crimes.

sense and realistic fashion. Therefore, technical requirements of elaborate specificity have no proper place in this area. *United States v. Ventresca*, 1965, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684.

[4] Generally, the sufficiency of a search warrant is determined solely with reference to the warrant and supporting affidavit. *State v. Oldack*, Fla.App. 2d 1973, 283 So.2d 73; *State v. Knapp*, Fla. App. 2d 1974, 294 So.2d 338. But even though sufficient on its face, the court, subsequent to issuance of a search warrant, may make a determination of the truthfulness of the factual statements contained in the warrant affidavit. In cases where the affiant subsequently contradicts material averments made to secure the warrant, or where otherwise such averments are proved erroneous, the warrant may be found to be invalid. *State v. Knapp*, *supra*; *United States v. Jones*, 5th Cir. 1973, 475 F.2d 723; *McConnell v. State*, 1972, 48 Ala.App. 523, 266 So.2d 328.

[5] Here the trial judge apparently concluded it was necessary to go behind the statements in the warrant affidavit. Pursuant to RCrP 3.190(h) an evidentiary hearing was held with testimony taken of Deputy Keister as well as of Detective Henry Rogers and Lt. E. H. Vogt, both of the Pasco County Sheriff's Department. But no findings or conclusions were made by the court on basis of the evidence presented. The court merely concluded the affidavit was insufficient to establish probable cause. However, where, as here, there had been an attack on the truth of the affidavit, it became incumbent on the trial judge to determine whether the affiant made any material misstatements in the warrant affidavit.

On remand, the trial judge should make findings: (a) as to whether any statements in the warrant affidavit were suc-

cessfully contradicted or proven erroneous, and (b) as to the effect of seizure of the items not specified in the warrant; and enter judgment accordingly.

Accordingly, this cause is reversed and remanded for proceedings consistent with this opinion.

GRIMES, Acting C. J., and SCHWARTZ, ALAN R., Associate Judge, concur.

APPENDIX D

EXCERPTS FROM THE MEDICAL RECORDS OF ELIGAAH ARDALLE JACOBS

APPENDIX D

SHANDS TEACHING HOSPITAL AND CLINICS • UNIVERSITY OF FLORIDA • GAINESVILLE

area code 904 [illegible]
zip 32610

August 7, 1975

P. O. Box J 345

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Judge Robert L. Williams
Pasco County Circuit Court
Sixth Judicial Circuit
Pasco County Court House
Dade City, Florida

Re: Eligaah Jacobs
Hospital No. 27-75-73

Dear Judge Williams:

Enclosed is a copy of the complete medical record of the above captioned patient persuent to the instructions of State Attorney Phill Van Allen.

Sincerely,

Carol Bessent

(Miss) Carol Bessent, A.R.T.
Medical Record Librarian
Medical Record Department

Enclosure

19-1030-1

U.S. EMPLOYMENT OPPORTUNITY-AFFIRMATIVE ACTION EMPLOYER

August 6, 1975

Re: JACOBS, Elijah
#27-75-73

Admission: 5-26-75
Discharge: 5-29-75

Medical Director
Reception and Medical Center
Lake Butler, Florida

Dear Sir:

Mr. Jacobs is a 36-year-old white male prisoner with a chief complaint of paralysis in both legs for about a month and a half. According to the history it began about 12 years ago when the patient had a lumbar laminectomy following back trauma. He states that his left leg was weak for a year and a half following that. In 1974 he had back trauma and vaguely dates the onset of his present bladder difficulties to that time. He says that only occasionally can he sense when he has to void and when he does it is usually only in a dribbling fashion and in small amounts. There is usually no voiding of large amounts. There is no fecal incontinence. He describes difficulty with sexual function for which he is very vague for about 12 years. He dates worsening of his bladder function to his fall one and a half months ago at which time he also became unable to walk. The patient has a history of a gunshot wound to his abdomen several years ago. He also has a history of attempted suicide.

Our examination revealed an alert, oriented male who appeared to be in no acute distress. Cranial nerves II-XII were unremarkable. Motor examination revealed normal bulk, strength, and tone in the upper extremities. Lower extremities had normal tone, however, they remained flaccid without any evidence of motor function. The patient, however, could squeeze the buttocks together. There is no spasticity, fasciculations, or wasting. Sensation is absent to the hips, however, he feels a pin on his genitalia and anus. If anything, the level would probably be about L1. He had 1+ reflexes in his upper extremities and 0-1 in his lower extremities. He had intact bulbocavernosus, good anal sphincter tone, and he perceived pain in the perineate well. On rectal examination the patient was found to have an equivocal anal wink. The remainder of his examination was noncontributory. Neck was supple, chest was clear.

The patient underwent several studies including lumbosacral films which showed normal sacroiliac joints, normal chest films. The patient had a myelogram with flow through the thoracic and cervical areas. The myelogram was unremarkable. The patient also had a cystometrogram which was within normal limits including feeling of sensation, urge to void, etc. The patient had

an EKG and serum electrophoresis which were normal. Urinalysis was unremarkable. His IgG was 9.7%, normal being 3-11%; serum CSF VDRL was nonreactive. His electrolytes were unremarkable as well as calcium, LDH, SGOT, total proteins, creatinine, BUN, and uric acid. His corrected sdd rate was 35.26 Since the patient had a normal myelogram and a normal cystometrogram, our impression was paraplegia of unknown etiology. Although we suspect that there is a functional etiology for this we cannot be certain that the patient does not have a transverse myelitis from some other reason. Although we requested an ANA I do not see one in the chart, therefore, we would suggest that this be done to make certain that the patient doesn't have a vasculitis.

Thank you for letting us help take care of your patient.

Sincerely yours,

K. M. Heilman, M.D.
Professor
Department of Neurology

And

Todd Hartley, M.D.
Department of Neurology

KMH:jh

5/26/75 Pen Admit Note

36 yo WM prisoner c CC paralysis both legs x 1½ mos. Hx of difficulty begins 12 yrs ago when had lumbar laminectomy following back trauma. States (L) leg weak for 1½ yrs p that. Nov 74 again had back trauma + rather vaguely dates onset present bladder difficulties to that time. He states that he only voids can sense when he has to void, and when he does it is usually in a dribbling fashion c small amts. Usually no precipitant void of med large amts. No fecal incontinence. Describes difficulty c sexual function very vague x12 yrs (sounds like ? libido rather than impotence). Dates worsening of bladder function to his fall 1½ mos ago when he became unable to walk.

PMH essent. neg. GSW to abd several yrs ago
no meds or allergies

Social - 3 witnesses, including his wife, state that he murdered two men. He has already attempted suicide by slashing wrists while in County jail. Was at Raiford awaiting trial.

Exam

MS - alert, oriented, dull

Motor - nl bulk, power, tone UE's. Essent nl tone LE's, c o motor function, although he can squeeze buttocks together somewhat weakly. No spasticity, no fasciculations.

Sensory - absent vib, prop, pin to hips. Feels pin on genitalia + anus, ↓ somewhat on (R) buttock peripherally. Clonus ↑ UE's. A level is rather vaguely obtainable at L_1.

13-0372-0

Best Copy Available

APPENDIX E

AFFIDAVIT OF FORMER COUNSEL

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF PASCO

Before me, the duly authorized undersigned authority, this date personally appeared LESTER BALES, JR., Attorney at Law, 507 Eighth Street, Zephyrhills, Florida 33599, PH. (813) 782-2079, who, after being first duly sworn by me, deposes and says:

I.

That Affiant, an Attorney at Law, licensed to practice in the State of Florida, by Order of the County Court of the Sixth Judicial Circuit in and for Pasco County, Florida, was appointed as Special Public Defender to represent one ELIGAAH ARDALLE JACOBS, who was indicted on two first-degree murder charges by Grand Jury duly convened in Pasco County, Florida.

II.

That said homicides were subsequently heard by the Circuit Court in and for Pasco County, Florida, being No. 74-1408.

III.

That during the course of said proceedings, two Orders were entered by the Circuit Court in and for Pasco County, Florida, pursuant to motions made by the State for extension of the trial date and the Speedy Trial Rule, said orders being entered on April 16, 1975 and June 11, 1975.

IV.

That Affiant, as attorney for said defendent, did oppose both the said motions and, in fact, never did agree to any extension of the Speedy Trial Rule.

Further Affiant saith not.

Lester Bales

LESTER BALES, JR.

Sworn to and subscribed before me this 30th day of July, 1981.

Linda F. Gray

Notary Public

Notary Public, State of Florida